FAR-29371

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

ESSEX, ss.

HAVERHILL STEM LLC and CAROLINE PINEAU,
Plaintiffs- Appellees
v.

LLOYD JENNINGS and BRAD BROOKS,
Defendants and Appellees

APPLICATION UNDER M.R.APP.P 27.1 OF THE DEFENDANTS-APPELLANTS LLOYD JENNINGS AND BRAD BROOKS FOR FURTHER APPELLATE REVIEW.

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APPLICATION FOR FURTHER APPELLATE REVIEW BY THE DEFENDANTS/APPELLANTS LLOYD JENNINGS AND BRAD BROOKS.

(1) Request For Further Appellate Review.

Pursuant to M.R.App. P. 27.1, defendants Lloyd Jennings and Brad Brooks ("defendants") hereby request further appellate review of the decision of the Appeals Court in Haverhill Stem LLC v. Jennings, 2023 WL 3555117, No. 22-P-830 issued May 19, 2023 ("Haverhill Stem II") affirming the denial of Defendants' Renewed Motion to Dismiss in Essex Superior Court, No. 1977CV00794, based upon the absolute litigation privilege ("litigation privilege") which was subsequently issued in the case of Bassichis v. Flores, 490 Mass. 143 2022("Bassichis") decided after the initial appeal and decision in Haverhill Stem v Jennings,99 Mass. App.Ct.626 (2021)(Haverhill Stem I)rejecting the defense of the litigation

privilege in the case at bar. A copy of the decision in Haverhill Stem II is attached hereto along with a copy of the prior decision in Haverhill Stem I.

(2) Statement of Prior Proceedings.

Plaintiffs brought suit in the Essex Superior Court against the defendants for violation of the Massachusetts Civil Rights Act, civil harassment, interference with contractual relations, violations of M.G.L.c. 93A, civil conspiracy, and defamation based on an attempt to thwart the application of plaintiffs for a special zoning permit to operate a recreational marijuana facility in a building abutting defendants' property.[1] Defendants filed a Special ANTI-SLAPP Motion to Dismiss claiming that plaintiffs' suit was an unlawful attempt to chill defendants' lawful protected petitioning rights to oppose the permitting of a recreational marijuana facility; and also that the oral settlement discussions and negotiations that formed the basis of the complaint were barred by the absolute litigation privilege in anticipation of

[1]The harassment and interference claims were dismissed.

litigation, namely a special zoning permit hearing and two subsequently filed Land Court cases involving the zoning for the proposed marijuana facility.

The Superior Court (Deakin, J.) denied the motion as to the motion to dismiss stating as to litigation privilege that the since the defendants actions were an attempt to extort money and since they were looking for money to resolve their opposition to the application for the zoning permit that were preliminary to the Land Court actions, which could not have given defendants any money, the privilege did not apply in addition to that it was not defendants' statements but that their misconduct that was "evidence of the speaker's misconduct."

In affirming the denial of the special motion, the Appeals Court in Haverhill Stem I held that certain of the defendants' threats were made "in order to coerce Pineau to pay money in exchange for which the defendants would drop their opposition to the proposed marijuana dispensary" which statements were not "in connection with" an issue under consideration

by a government body and "were not reasonably related to the defendants' opposition to Pineau's marijuana facility"; and thus were "not based solely on petitioning activity and not subject to dismissal." The Appeals Court reasoned that "much of defendants' conduct alleged here cannot properly be considered as in connection with litigation"; and was not protected by the litigation privilege" **because since defendants sought money the relief in the Land Court cases "could not be obtained as a result of the contemplated Land Court litigation that could not have awarded them the money sought" [2]and" that it was "not sufficiently related to any judicial proceeding.**" (emphasis added). The Appeals Court also held that the litigation privilege did not apply where it was the defendants conduct and not the statements that were actionable.[3]

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[2] Defendants sought as consideration for their withdrawal of their opposition to the marijuana facility not only money, but several other non-monetary concessions concerning the use and operation of the facility again showing the relationship to the settlement negotiations.

[3] This distinction between conduct and statements made by the Appeals Court was overruled in Bassichis.

Following the decision by the SJC in Bassichis, defendants filed a Renewed Motion to Dismiss based on the litigation privilege. The Essex Superior Court (Karp, J.) denied the Renewed Motion to Dismiss on August 16, 2022, without any reason in stating that the Court read that decision and that the motion was denied. The Defendants filed a notice of appeal under the present execution doctrine. The Appeals Court in Haverhill Stem II held that the "principal public policies" of Bassichis and the issues decided by that Court did not overrule or control the case at bar. As to "some relationship to the [contemplated proceedings], the Court held that "no Massachusetts court has fully embraced the comment [Restatement (Second) of Torts § 587" citing cases decided prior to Bassichis.[4] The Appeals Court stated without any explanation in conclusory statements that "many of defendants' alleged statements, including those about

[4] In footnote 14, the Appeals Court cited section 586 of the Restatement (Second)of Torts for the same proposition as Section 587 but stated that Section 586 applies to an attorney "and is plainly inapplicable in this case."

Pineau's $30,000 debt that defendants knew she did not owe, have no "reasonable relation or reference to the subject inquiry, and could not possibly be pertinent to the contemplated proceedings."

As stated in Haverhill Stem II, the Court stated the issue to be whether Bassichis overruled the decision in Haverhill Stem I, which it answered in the negative. Defendants have not sought nor are seeking a reconsideration or modification in the Appeals Court.

(3) Short Statement of Facts Relevant to the Appeal.

Haverhill Stem and its principal Caroline Pineau ("Pineau") sought to operate a recreational marijuana facility in a building next door to that of the defendants and approached defendants to obtain their assent to her application for a special zoning permit, as to which defendants "actively opposed the proposed use." At multiple meetings to settle their opposition, defendants informed them they were seeking $30,000 or more and other concessions as to usage.

As noted in Haverhill Stem II, Pineau approached defendants who "agreed to settle the matter if Pineau

pays no less than $30,000" and other conditions as to the use of the building. "During subsequent negotiations between Pineau's attorney" and defendants, the settlement demand increased to $50,000 and to $75,000, "but [they]were unable to reach an agreement." Defendants "rejected Pineau's final settlement offer on April 3, 2019." Jennings "restarted negotiations and offered to settle the matter for a $75,000 payment."

Defendants then filed suit in the Land Court to invalidate the applicable zoning by law; and subsequently opposed the application before the zoning board in addition to appealing the granting of the special permit.[5] Of particular note was that Haverhill Stem II acknowledged that all these events occurred during settlement negotiations with Pineau and her attorney in an attempt to resolve defendants' opposition to the special permit and her use as a marijuana facility.

[5] In addition, there was pending the zoning hearing for the special permit that was granted and subsequently appealed to the Land Court.

(4) Statement of Points to Which Further Appellate Review of the Decision of the Appeals Court is Sought.

1. Whether the Bassichis case holding and the "principal public policies" stated therein are controlling as to litigation privilege in determining whether the standard for attorneys is different for non-attorney parties engaged in "private settlement negotiations" preliminary to anticipated judicial and quasi-judicial proceedings, such as to overrule Haverhill Stem I.

2. Since the holding in Bassichis stated that the litigation privilege covered generally all civil action without any stated exceptions, it should be applied to the statements and actions in this case during settlement negotiations by parties.

3. Whether the Appeals Court's holdings in both appellate cases, that many of defendants' statements during settlement discussions and negotiations "have no reasonable relation or reference to the subject of inquiry or reference to the subject of inquiry and could not possibly be pertinent" and were not covered by the absolute litigation privilege, were erroneous

and contrary to Bassichis which adopted Restatement (Second) of Torts requiring that the words or conduct for the privilege have "**some relation to the proceeding**" and are to be broadly construed with all doubt resolved in favor of the privilege.

4. Whether the underlying public policies stated in Bassichis allowing parties to speak freely and openly "without fear of civil liability"; that "it is more important that witnesses be free from the fear of civil liability for what they say than a person who has been harmed by their testimony have a remedy"; and that "it is preferable to bar all actions based on statements made in the course of litigation, rather than to open the floodgates to groundless lawsuits that would clog the courts with pointless litigation" "to avoid unending litigation" and "not clogging dockets" with "unending litigation" are equally applicable to the case at bar and should have been applied by the Appeals Court.[6]

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[6] The Appeals Court in its opinion **never** mentioned nor discussed these public policy reasons for the litigation privilege. See also Restatement (Second)

(5) Brief Statement Of Why Further Appellate Review Is Appropriate.

This case involved critically important issues and public policies as to the relationship of the litigation privilege concerning oral statements made by parties during settlement negotiations prior to and in anticipation of quasi-judicial and judicial proceedings. Contrary to Bassichis, the Appeals Court erroneously held in Haverhill Stem II that Bassischis did not overrule Haverhill Stem I; in particular as to the relationship requirement for the litigation privilege. The Court also noted that the policy for the absolute litigation privilege was different for attorneys as opposed to parties and not applicable as to the relation of statements to the proceedings which is contrary to Bassichis that it applied also to parties and that it have "some relationship", contrary to the Restatement (Second)of Torts definition of

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of Torts § 587 comments a "The privilege stated in this Section is based on the public interest in according to all men utmost freedom of access to the courts of justice for the settlement of private disputes."

"some relation", and contrary to policy broadly favoring and construing "some relationship" to anticipated litigation in order to promote open and free discussions along with encouragement of settlements by parties. The Court erroneously ignored the Bassichis Court's adoption of the Restatement (Second)of Torts requirement of "**some relationship to the proceeding.**" The holdings of the Appeals Court in both appeals requiring a relationship to litigation where only money damages are available; and/or of a standard of a "reasonable relation"; "reference to the subject of inquiry"; and "possibly be pertinent to the contemplated proceeding" were contrary to Bassichis.[7]

The Appeals Court in both appeals failed to apply the litigation privilege in accordance with Bassichis and its adopted Restatement (Second) of Torts stating without explanation in Haverhill Stem II that "much of the defendants" conduct alleged here cannot properly

[7] None of the words used by the Appeals Court in Haverhill Stem II appear in Bassichis nor the Restatement of Torts (Second) nor even in any prior case law.

be considered as "connected with litigation" and "have no reasonable relation or reference to the subject inquiry" and "not possibly pertinent", and accordingly were not protected by the litigation privilege. The Appeals Court likewise agreed with Haverhill Stem I that since the request by defendants for monetary relief could not be obtained by in the Land Court cases, it was "not sufficiently related to a judicial proceeding to be protected by the privilege" and constituted misconduct that was not protected. Haverhill Stem II in failing to overrule Haverhill Stem I especially as to the relationship requirement failed to apply the "some relationship" requirement as mandated by Bassichis.

In Bassichis, the SJC held that an attorney's participation in a fraudulent scheme and fraudulent misrepresentations to a Court were protected by the absolute litigation privilege. "The privilege applies regardless of malice, bad faith, or any nefarious motives on the part of the lawyer **so long as the conduct complained of has some relation to the**

litigation." 490 Mass. 143, 151 (2022) (emphasis added).

This "relatedness" factor is broadly construed in that "the words pertinent to the proceeding are not to be construed narrowly, nor according to evidentiary rules as to admissibility." *See* Sullivan v. Birmingham, 11 Mass. App. ct. 359, 362 (1981); *see also* Aborn v. Lipson, 357 Mass. 71, 73 (1970) (quoting Prosser, Torts, (3d ed) s. 109) ("that all doubt be resolved in favor of the defendant.").[8]

"The reason for the privilege is that it is more important that witnesses be free from fear of civil liability for what they say than that a person who has been defamed by their testimony have a remedy." *See* Correllas v Viveiros, 410 Mass 314, 324 (1991); Patriot Group LLC v. Edmands, 96 Mass. App. Ct. 478, 484 (2018). The privilege applies regardless of the

[8] Relevance is broadly construed. Blanchette v. Cataldo, 734 F.2d 869, 877 (1st Cir.1984) (interpreting Massachusetts law); Aborn v. Lipson, 357 Mass. 71(1970); and Adelphia Agios Demetrios, LLC v. Arista Dev.,LLC, No. CIV.A. 12-10486-RWZ, 2014 WL 1399411, at *4 (D. Mass. 2014).

underlying intent even if made maliciously and in bad faith. *See* Restatement (Second) of Torts § 586, comment a; Leavitt v. Bickerton, 855 F. Supp. 455, 457 (D. Mass. 1994); Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 140-141 (1996).

The Appeals Court in Haverhill Stem II also improperly drew a distinction between the privilege afforded to an attorney and that afforded to a party to an anticipated litigation stating "[Defendants] were not attorneys zealously representing clients during the course of a judicial proceeding, **but rather individuals engaged in prelitigation, private settlement negotiations.**" However, Bassichis and the Restatement (Second) Torts as adopted by Bassichis never made any such a distinction. *See* Restatement (Second) Torts § 587 Parties to Judicial Proceedings. "Like the privilege of an attorney, it is absolute." Restatement (Second) Torts § 587, comment a; *see also* comment d ("**The rule stated in this section affords to a party to litigation the same protection from liability for defamatory statements made in his**

pleadings as that accorded to an attorney under the rule stated in § 586.") (emphasis added).

The reasoning of the Appeals Court that the monetary relief sought during the settlement negotiations was "not reasonably related" or not "possibly be pertinent" to the proceedings was unprecedented and erroneous. The Appeals Court in Haverhill Stem II ruled without any explanation or reasoning that "many of the defendant's alleged statements, including those about Pineau's $30,000 debt that defendants knew she did not owe, have no 'reasonable relation'[9]... and could not 'possibly be pertinent' to the contemplated proceedings." That Court further stated that the defendants "were not entitled to use the shield of the litigation privilege to make threats or false statements unrelated to the

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[9] There is a major, significant, and material difference between "some relation" and a "reasonable relation." Also, since pertinent is synonymous with relevant or relevancy, that too is a major, significant, and material difference from "some relation." Regardless, the Bassichis Court never used any of the language stated in Haverhill Stem II, which also was not in the Restatement (Second) of Torts adopted by Bassichis.

contemplated… proceedings" yet the privilege specifically protects "**from liability for defamation irrespective of his purpose in publishing the defamatory matter, of his belief in its truth or even his knowledge of its falsity.**" *See* Restatement (Second) Torts § 587, comment a. The only statement which the Appeals Court noted as beyond the privilege was the alleged false allegations of debt, but the privilege specifically protects knowingly false statements.

A statement that Plaintiffs owed Defendants $30,000 for them to not contest their marijuana dispensary license, even if false, is privileged as it related to and arose during the settlement negotiations of an underlying dispute. As noted in Restatement of Torts (Second) § 586 (as to Attorneys) in comment c. entitled "Relation of statement to proceedings": "Therefore it is available only when the defamatory matter has some reference to the subject matter of the pending litigation, **although it need not be strictly pertinent or relevant to any issue**

involved therein." (emphasis added). Similarly, Restatement (Second) of Torts § 587 (as to Parties) in comment c. entitled "Relation of statement to proceedings": "**It is not necessary that the defamatory matter be relevant or material to any issue before the court.** It is enough that it has some reference to the subject of inquiry. While a party may not introduce into the pleadings defamatory matter which is entirely disconnected with the litigation, he is not answerable for defamatory matter volunteered or included by way surplusage in his pleadings **if it has any bearing upon the subject matter of the litigation.**" (emphasis added).

The Appeals Court in Haverhill Stem II acknowledged that all the statements complained of were part of "prelitigation, private settlement negotiations" which implied there was some relation to the anticipated judicial and quasi- judicial litigation. That Court noted that the interactions between Plaintiffs and Defendants were part of an ongoing effort to settle their dispute; thus, there

was some relationship between the alleged statements and the anticipated proceedings, and any doubt should have been resolved in favor of the privilege. Aborn v. Lipson, 357 Mass. 71, 73 (1970).

To hold otherwise will expose every party in settlement discussions to potential civil liability contrary to Bassichis if their statements do not reasonably relate or are pertinent or relevant to the possible recovery to their claims or the subject matter of their case. It will make the privilege a hollow promise because parties will fear being dragged into Court for statements made during settlement negotiations, thereby having a chilling effect on future settlements and hindering judicial efficiency while encouraging more litigation, contrary to Bassichis and its stated public policies favoring the litigation privilege.

The Appeals Court since Bassichis has applied the litigation privilege, but failed to in this case:

Kasparian v. Roman, 102 Mass. App. 1119 (2023) - Humiliating statements and false accusations that

plaintiff had a criminal record made during a deposition were protected "so long as the conduct complained of has some relation to the litigation."

Barnes v. Johnston-Neeser, 101 Mass. App. Ct. 115 (2022) - Lawyers statements and conduct during settlement negotiations to resolve a legal dispute that were "preliminary to litigation" and were covered by the litigation privilege. The statements were made to "browbeat" plaintiff to sell her stock at "a vastly discounted price" with "false accusations of theft" and "threats…to destroy SE rather than paying Barnes a fair value for her stock."

Chalifoux v James, 100 Mass. App. Ct. 1127 (2022) - A party's statement that he intended to sue the defendant because of a criminal application during settlement discussions was barred by the privilege.

Trahan v. Pelczar,101 Mass. App. Ct. 1116 (2022) - A party's alleged breach of a settlement agreement during a deposition that defendant "stole" and was a "bookie" were barred by the litigation privilege.

By their attorneys,

/s/ Alvin S. Nathanson

June 8,2023

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CERTIFICATION UNDER M.R.APP. P. 27 (b)

I, Alvin S, Nathanson, attorney for the defendants/appellants hereby certify that the within motion complies with M.R.APP. P. 20 (a) in that the portion of the application under M.R.APP. 27.1 (b) (5) does not exceed ten (10) pages and 2000 words (exclusive of this certification and the certificate of service) as counted and as compiled by the computer and shown thereon and as evidenced by the numerical number of pages.

/s/ Alvin S. Nathanson

Alvin S. Nathanson,

CERTIFICATE OF SERVICE

I, Alvin S. Nathanson, attorney for the defendants-appellants hereby certify that on June 8, 2023 I did serve a copy of the within Application for Further Appellate Review upon counsel for the Plaintiff-Appellee by email and by mailing by first class mail postage an prepaid and by email to the following:

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/s/ Alvin S. Nathanson

Alvin S. Nathanson

Exhibit A

2023 WL 3555117
Unpublished Disposition
Only the Westlaw citation is currently available.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).
Appeals Court of Massachusetts.

HAVERHILL STEM LLC & another [1]

v.

Lloyd JENNINGS & another. [2]

22-P-830

Entered: May 19, 2023

By the Court (Sullivan, Desmond & Singh, JJ. [3])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** After an unsuccessful interlocutory appeal from the denial of their special motion to dismiss under the "anti-SLAPP statute," see Haverhill Stem LLC v. Jennings, 99 Mass. App. Ct. 626, 630-635 (2021) (Haverhill Stem I), the defendants, Lloyd Jennings and Brad Brooks again appeal, this time challenging an order denying their renewed motion to dismiss the plaintiffs' complaint based upon the absolute **litigation privilege**. We affirm.

Our review of a ruling on a motion to dismiss is de novo. See Bassichis v. Flores, 490 Mass. 143, 148 (2022). In contrast to an appeal involving a special motion to dismiss under the anti-SLAPP statute, which anticipates review of an evidentiary record, see G. L. c. 231, § 59H; Haverhill Stem I, supra at 627 n.3, we consider only the facts alleged within the four corners of the complaint. See Bassichis, supra. Accordingly, we recite so much of the facts alleged in the verified complaint that are relevant to the **litigation privilege** defense, accepting "as true all of the facts alleged ... and [drawing] all reasonable inferences in the plaintiffs' favor." [4] Id.

Seeking to operate a marijuana dispensary in the city of Haverhill (city), Caroline Pineau advocated for zoning changes to the downtown area and began applying for the appropriate licenses to operate an establishment in a building she leased from her father. [5] Her next door neighbors, Lloyd Jennings and Brad Brooks, actively opposed the proposed use. [6] When Pineau called Brooks in October 2018 to discuss her plans, he stated, "[W]ell, you better bet me and my partner are going to get our money back from the deck we built, which is $30,000, and make sure you go through the same hell with the city that we did." [7] To Pineau's suggestion that "they could be good neighbors," Brooks responded, "[N]o, we said whoever bought that building owes us $30,000 and we will fight them every step of the way." A series of meetings ensued in an attempt to settle their differences.

***2** At a meeting requested by Brooks with Pineau and her husband held on November 3, 2018, Brooks and Jennings informed them they were seeking $30,000 "regardless of who bought the building" and that they "would fight whatever Pineau proposes for use of the building."

After this meeting, Brooks and Jennings publicly circulated their demand for money, informing members of the Haverhill downtown community that "the [p]laintiffs owed them $30,000." Several people asked Pineau "why she owes [the defendants] $30,000." Pineau had no debt obligation to Brooks or Jennings.

After the city approved downtown zoning for marijuana establishments in January 2019, Jennings stated to several people around town, "[Pineau] doesn't know who she is dealing with" [8] and "she'll see how Haverhill works."

In early March 2019 Pineau approached Brooks requesting another meeting aimed at "[setting] aside their issues." Accompanied by her attorney, Pineau met with Brooks and Jennings on March 15. Jennings agreed to settle the matter if

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Pineau paid him "no less than $30,000," gave him sole use of the deck behind 124 Washington Street, see note 6, supra, and agreed not to conduct her cannabis business on the second and third floors of the building. Absent a financial resolution, Brooks and Jennings threatened to bring a "RICO"[9] lawsuit against Pineau. No agreement was reached.

During subsequent negotiations between Pineau's attorney on one side and Brooks and Jennings on the other, Brooks and Jennings increased their cash demand to $50,000 and then to $75,000. Although the parties went back and forth, they were unable to reach an agreement. Brooks and Jennings rejected Pineau's "final" settlement offer on April 3, 2019.

Shortly thereafter, Jennings restarted negotiations, and offered to settle the matter for a $75,000 payment. When Pineau's husband met with Jennings to discuss the offer on April 10, Jennings stated that he had been "insulted by the whole process" and that he "hasn't been shown the respect he deserves." He informed Pineau's husband that while he was still willing to "talk about a deal," that might change because the defendants were meeting with their Boston lawyers the next day "to pursue a RICO lawsuit." Jennings further stated if the defendants were not able to use the deck, "the price would be much higher." Pineau's husband responded that "it was unlikely that they would be able to negotiate about the deck because of the regulations of the Cannabis Control Commission.

Jennings became very angry at that point, stated that he did not care for the Pineaus or their approach, and alleged that they had lied to him. He further stated that "he was prepared to try to destroy the Pineaus and their business before it got off the ground ... [and that] the Pineaus don't have the money to fight him and he has already won and was prepared to take everything from the [Pineaus], including their house." Throughout this meeting, Jennings reiterated that the Pineaus "didn't know who [they] were messing with when [they] started this." On May 30, 2019, the defendants and a third party filed an action in the Land Court seeking to invalidate the recreational marijuana zoning bylaw. This action followed in short order.[10]

***3** Discussion. Following a Superior Court order denying the defendants' renewed motion to dismiss, this interlocutory appeal is properly here under the doctrine of present execution.[11] See Haverhill Stem I, 99 Mass. App. Ct. at 635; Marston v. Orlando, 95 Mass. App. Ct. 526, 535 n.22 (2019). The sole issue for determination is whether the **litigation privilege**, as recently clarified by the Supreme Judicial Court in Bassichis, 490 Mass. at 149-160, overruled Haverhill Stem I, supra at 635-637, and barred this action. In Haverhill Stem I, we decided the **litigation privilege** defense adversely to the defendants. Given its importance for present purposes, we set out our analysis in detail.

Therein, we first concluded that while some of the plaintiffs' allegations were based on the defendants' petitioning activities, "other significant allegations [were] not," and thus the plaintiffs' claims "survive an anti-SLAPP motion." Haverhill Stem I, 99 Mass. App. Ct. at 631-632. In concluding that the plaintiffs' claims were not based solely on petitioning activity, we reasoned:

> "[S]ome of the defendants' statements to the Pineaus cannot reasonably be viewed as relating to the defendants' petitioning activities.... [T]he defendants' focus was to obtain money from Pineau that the defendants knew Pineau did not owe to them. It was in this context – seeking the $30,000 – that Jennings made the statements that the Pineaus did not have the money to fight him, that he was preparing to file a RICO claim, and that he 'was prepared to take everything from the Pineaus, including their house.' Those statements were not reasonably related to the defendants' opposition to Pineau's marijuana dispensary. The defendants' opposition to the dispensary through the Land Court litigation could not have led to the defendants obtaining money from the Pineaus through a lawsuit, let alone to causing the Pineaus financial ruin. Rather, the statements by Jennings, if proved, were part of an extended pattern of threats, made in an effort to coerce payment" (footnote omitted). Id. at 633.

Rejecting the defendants' argument that they were merely opposing Pineau's proposed business and negotiating a price to forego their opposition, conduct we found unobjectionable, we concluded that "the complaint describes a concerted and extended effort to coerce Pineau to pay, 'or else' -- complete with thinly veiled threats ... [and] thus adequately describes extortion -- coercion by improper means that is designed to reap an economic reward. Such actions, in the business context, can be actionable under c. 93A." Id. at 634. We also rejected the defendants' similar argument that "all Pineau has alleged are hardball negotiating tactics ... [that are] accepted business practices that cannot be actionable." Id. at 634-635. We reasoned that while "rough and tumble" negotiations are permissible, "the repeated threats alleged here, designed to coerce payment – including threats that portended economic

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ruin without basis – fell outside any acceptable boundary" separating legitimate petitioning activity from unprotected conduct. Id. at 635.

***4** In addressing the litigation defense, we acknowledged the broad scope of the privilege, which "generally precludes civil liability based on 'statements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding,' as well as statements 'preliminary to litigation' that relate to the contemplated proceeding." Haverhill Stem I, 99 Mass. App. Ct. at 636, quoting Gillette Co. v. Provost, 91 Mass. App. Ct. 133, 140 (2017). Applying a "fact-specific analysis" as to whether the defendants' out-of-court statements sufficiently related to litigation, we concluded that "much of the defendants' conduct alleged here cannot properly be considered as in connection with litigation" (citation omitted). [12] Haverhill Stem I, supra at 636. See Bassichis, 490 Mass. at 153-154.

On appeal the defendants argue that two main aspects of Haverhill Stem I run afoul of Bassichis and prior precedent and cannot stand. First, they contend that "so long as [their] act[s] [and statements had] some relation to the proceeding," the **litigation privilege** protects participants against all civil liability, and that no exceptions to the privilege exist for statements and conduct amounting to "extortion" or where monetary damages are unavailable for the pending or contemplated litigation. See Haverhill Stem I, 99 Mass. App. Ct. at 636-637. They further argue that the Supreme Judicial Court's extension of the privilege to conduct in Bassichis necessarily overruled this court's application of the distinction between "statements" and "conduct" in Haverhill Stem I, supra at 637.

To the extent that Jennings and Brooks claim their alleged statements and conduct fall within the absolute **litigation privilege**, they were not attorneys zealously representing clients during the course of a judicial proceeding, but rather individuals engaged in prelitigation, private settlement negotiations. Given the different context in which the case arose, the principal public policies underlying the Bassichis decision, and the precise issue decided, we are not persuaded that the Bassichis case overrules Haverhill Stem I or controls the case at bar. [13]

In any event, regardless of whether Bassichis may have cast into doubt some of the reasoning in Haverhill Stem I, a point we need not decide, the Supreme Judicial Court did not purport to change the requirement that the communications and conduct have "some relation to the proceeding." Bassichis, 490 Mass. at 150, quoting Restatement (Second) of Torts § 586 (1977). Accordingly, our ultimate conclusion in Haverhill Stem I -- that "much of the defendants' conduct alleged here cannot properly be considered as in connection with litigation" -- remains intact. Haverhill Stem I, 99 Mass. App. Ct. at 636. In short, just as the defendants did not have "free rein to threaten and coerce" because they were involved in legitimate petitioning activity, id. at 635, they were not entitled to use the shield of the **litigation privilege** to make threats or false statements that were unrelated to the subject of the contemplated city council and Land Court proceedings. See Bassichis, 490 Mass. at 150. See also Hoar v. Wood, 3 Met. 193, 197 (1841) (**litigation privilege** is unavailable where party or counsel uses opportunity "to gratify private malice by uttering slanderous expressions ... which have no relation to the cause or subject matter of the inquiry"); Robert L. Sullivan, D.D.S., P.C. v. Birmingham, 11 Mass. App. Ct. 359, 362 (1981) (doctrine of absolute "privilege ... cannot be exploited as an opportunity to defame with immunity").

***5** We are not persuaded by the defendants' continued insistence that all their alleged statements and conduct had "some relationship to the [contemplated] proceeding[s]." To the extent that the defendants urge this court to apply the relevancy test appearing in comment c of the Restatement (Second) of Torts § 587, no Massachusetts court has fully embraced the comment or its language. [14] See Correllas v. Viveiros, 410 Mass. 314, 319-321 (1991) ("[s]tatements made in the course of a judicial proceeding which pertain to that proceeding" as well as "statements made by a witness or party during trial, if 'pertinent to the matter in hearing' " are absolutely privileged [citation omitted]); Sriberg v. Raymond, 370 Mass. 105, 108 (1976) ("statements by a party ... in the institution of ... a judicial proceeding are absolutely privileged provided such statements relate to that proceeding"); McLaughlin v. Cowley, 127 Mass. 316, 319 (1877) (English privilege rule was adopted by American courts "with the qualification, as to parties, counsel, and witnesses, that their statements made in the course of an action must be pertinent and material to the case"). See also Kobrin v. Gastfriend, 443 Mass. 327, 345-346 (2005); Gillette Co., 91 Mass. App. Ct. at 140 and cases cited; Dolan v. Von Zweck, 19 Mass. App. Ct. 1032, 1033 (1985).

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It is well-established, however, that "[t]he words 'pertinent to the proceedings' are not to be construed narrowly." Robert L. Sullivan, D.D.S., P.C., 11 Mass. App. Ct. at 362, quoting Aborn v. Lipson, 357 Mass. 71, 73 (1970). See Blanchette v. Cataldo, 734 F.2d 869, 877-878 (1st Cir. 1984) (applying Massachusetts law); Dear v. Devaney, 83 Mass. App. Ct. 285, 291 n.5 (2013). Even under the broadest construction, many of the defendants' alleged statements, including those about Pineau's $30,000 debt that the defendants knew she did not owe, have no "reasonable relation or reference to the subject of inquiry" and could not "possibly be pertinent," Aborn, supra, to the contemplated proceedings, and thus fell outside of the protection of the privilege. [15]

Order denying renewed motion to dismiss affirmed.

All Citations

Slip Copy, 2023 WL 3555117 (Table)

Footnotes

1 Caroline Pineau.

2 Brad Brooks.

3 The panelists are listed in order of seniority.

4 Several individuals, including Caroline Pineau and her former attorney, were deposed and several submitted affidavits in connection with the defendants' earlier special motion to dismiss. See Haverhill Stem I, 99 Mass. App. Ct. at 627 n.3. The defendants' lengthy recitations and quotations from these materials in their briefs as well as their denials of the factual allegations of the complaint, particularly their "threats," are not before us at this point in the proceedings.

5 In 2018 Pineau's father bought the building located at 124 Washington Street to assist his daughter with her business plans. Pineau also owns a yoga studio nearby on Washington Street.

6 Jennings and Brooks own the property located at 128-130 Washington Street and the restaurant located thereat called The Hungry Pig. Pineau and her husband, Jennings, and Brooks all reside in Haverhill.

7 In 2017, while the Victor Emmanuel Lodge (lodge) owned 124 Washington Street, Jennings and Brooks had plans to build a deck behind their property that extended fifteen feet over their property line on to the lodge's property. As a condition of building the proposed deck, Jennings and Brooks were required to build an identical deck behind 124 Washington Street at a cost of $30,000. See Haverhill Stem I, 99 Mass. App. Ct. at 628 ("As a result, in the defendants' view, 'the building,' ... owed the defendants $30,000"). Neither Pineau nor her father had anything to do with these negotiations or the final settlement agreement between the lodge, the defendants, and the city.

8 The plaintiffs allege that Jennings's criminal history is well-known in the community.

9 RICO is an acronym for the Federal Racketeer Influenced and Corrupt Organizations Act. See 18 U.S.C. § 1962(c) (1988). No RICO lawsuit was ever filed and the defendants do not challenge this court's conclusion that such litigation was not seriously contemplated in good faith as to give rise to a potential **litigation privilege**. See Haverhill Stem I, 99 Mass. App. Ct. at 636 n.15.

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10 The complaint contained six counts; at this time, four claims remain pending against the defendants: alleged violations of the Massachusetts Civil Rights Act, alleged violations of G. L. c. 93A, § 11, civil conspiracy, and defamation.

11 The defendants first raised the absolute litigation defense in their motion for reconsideration of the order denying their special motion to dismiss. While the defendants' first interlocutory appeal was pending in this court, a Superior Court judge denied the motion. In our discretion, in Haverhill Stem I, we chose to reach the defense "in the interest of efficiency." Haverhill Stem I, 99 Mass. App. Ct. at 635-636. After Bassichis was handed down in July 2022, another Superior Court judge denied the defendants' renewed motion to dismiss based on that case.

12 In Haverhill Stem I, 99 Mass. App. Ct. at 630 n.7, we described the litigation "contemplated" by the defendants and eventually brought as two Land Court cases: one challenging the validity of the city's recreational marijuana zoning bylaw and the other challenging the city council's issuance of a special permit. The first Land Court action ended in a judgment adverse to the defendants, a result affirmed by this court. See Brooks v. Haverhill, 100 Mass. App. Ct. 1105 (2021). The defendants voluntarily dismissed the second Land Court action. See Haverhill Stem I, supra.

13 In Bassichis, the court held that the **litigation privilege** applied not only to alleged misrepresentations made to a judge by an attorney, but also to the attorney's "actions" taken during the course of litigation to obtain a favorable result for his client. See Bassichis, 490 Mass. at 149, 157-158. In reaching its decision to immunize the defendant attorney from liability, the court found "persuasive" two reasons for extending the privilege to fraudulent misrepresentations by attorneys: the encouragement of "robust representation of clients"; and the protection of the "overwhelming number of innocent attorneys from unjust claims" and "retaliatory litigation" (citation omitted). Id. at 154-155. The policies furthered by the holding of Bassichis have no application here.

14 As highlighted by the defendants, comment c to § 587 provides that, "[i]t is not necessary that the defamatory matter be relevant or material to any issue before the court. It is enough that it have some reference to the subject of the inquiry.... [The party] is not answerable for defamatory matter volunteered or included by way of surplusage in his pleadings if it has any bearing upon the subject matter of the litigation. The fact that defamatory publication is an unwarranted inference from the alleged or existing facts is not enough to deprive the party of his privilege, if the inference itself has some bearing upon the litigation." The defendants also cite to the similar relationship test set forth in Restatement (Second) of Torts § 586, comment c. See Bassichis, 490 Mass. at 150. However, § 586 comment c applies only to "statements made by an attorney while performing his function as such" and is plainly inapplicable in this case.

15 The plaintiffs' request for an award of appellate attorney's fees and costs is denied.

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Exhibit B

99 Mass.App.Ct. 626
Appeals Court of Massachusetts,
Essex.

HAVERHILL STEM LLC & another [1]
v.
Lloyd JENNINGS & another. [2]

No. 20-P-537
|
Argued January 15, 2021.
|
Decided May 26, 2021.

Synopsis

Background: Prospective operators of marijuana dispensary, who sought to operate dispensary at a property they leased, brought action against owners of neighboring property who opposed the dispensary, asserting claims of violation of statute governing regulation of business practices for consumer protection, violation of Massachusetts Civil Rights Act, and defamation, which arose from allegations that neighbors coerced and threatened operators in an effort to extort money in return for neighbors' agreement to withdraw their opposition to proposed dispensary. The Superior Court Department, Essex County, David A. Deakin, J., denied neighbors' motion to dismiss under anti-SLAPP statute, granted in part and denied in part neighbors' motion to dismiss for failure to state a claim, and later denied neighbors' motion for reconsideration. Neighbors filed interlocutory appeal.

Holdings: The Appeals Court, Englander, J., held that:

[1] operators' claims were not based solely on neighbors' exercise of their right to petition the government, and thus dismissal of claims under anti-SLAPP statute was not appropriate, and

[2] neighbors' conduct was not sufficiently related to neighbors' litigation challenging city recreational marijuana zoning bylaw and award of special permit to operators of dispensary to be protected by litigation privilege.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim; Motion for Reconsideration; Motion for Attorney's Fees.

West Headnotes (17)

[1] **Appeal and Error** ⇐ On motion for dismissal or nonsuit

The denial of a motion to dismiss under anti-SLAPP statute is immediately appealable under the doctrine of present execution. Mass. Gen. Laws Ann. ch. 231, § 59H.

1 Case that cites this headnote

[2] **Appeal and Error** ⇐ On motion for dismissal or nonsuit

A denial of a motion to dismiss predicated on litigation privilege is immediately appealable under the doctrine of present execution.

[3] **Appeal and Error** ⇐ On motions relating to pleadings

The denial of a motion to dismiss for failure to state a claim generally is not appealable on an interlocutory basis. Mass. R. Civ. P. 12(b)(6).

[4] **Pleading** ⇐ Frivolous pleading

Anti-SLAPP statute provides mechanism for early dismissal of civil claims, where those claims are based solely on defendant's exercise of right of petition to government. U.S. Const. Amend. 1; Mass. Gen. Laws Ann. ch. 231, § 59H.

[5] **Pleading** ⇐ Application and proceedings thereon

A defendant seeking dismissal under anti-SLAPP statute must show, at the threshold, that the claims against it are based solely on its exercise of its constitutional right to petition.

U.S. Const. Amend. 1; Mass. Gen. Laws Ann. ch. 231, § 59H.

1 Case that cites this headnote

[6] **Appeal and Error** ⇐ Anti-SLAPP laws

Appellate courts review de novo a denial of a defendant's motion to dismiss under the anti-SLAPP statute due to the defendant's failure to meet the threshold element of showing that claims against the defendant are based solely on its exercise of its constitutional right to petition. U.S. Const. Amend. 1; Mass. Gen. Laws Ann. ch. 231, § 59H.

1 Case that cites this headnote

[7] **Pleading** ⇐ Application and proceedings thereon

Once a defendant invoking the anti-SLAPP statute meets the threshold showing that the claims against it are based on its exercise of its constitutional right to petition, the burden then shifts to the plaintiff, who can avoid dismissal by making one of two showings: (1) the defendant's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law, and the defendant's acts caused actual injury to the plaintiff; or (2) the plaintiff's suit was colorable, and the suit was not brought primarily to chill the defendant's legitimate exercise of its right to petition. U.S. Const. Amend. 1; Mass. Gen. Laws Ann. ch. 231, § 59H.

[8] **Pleading** ⇐ Frivolous pleading

Claims of prospective operators of proposed marijuana dispensary against owners of property neighboring dispensary were not based solely on neighbors' exercise of their right to petition the government, and thus dismissal of claims under anti-SLAPP statute was not appropriate; while some allegations in complaint were directed at neighbors' lawful petitioning activity, neighbors' focus was to obtain money that they felt was owed by previous owner of dispensary location, it was in that context that neighbors made concerted and extended effort to coerce operators to pay, including threats of operators not having the money to fight neighbors, of neighbors filing a racketeering claim, and of operators' financial ruin, and neighbors' opposition to dispensary could not have led to those outcomes. U.S. Const. Amend. 1; 18 U.S.C.A. § 1962(c); Mass. Gen. Laws Ann. ch. 231, § 59H.

1 Case that cites this headnote

[9] **Pleading** ⇐ Application and proceedings thereon

Defendants do not obtain dismissal through an anti-SLAPP motion just because some of the allegations in the complaint are directed at conduct by the defendants that constitutes exercise of defendants' constitutional right to petition the government; rather, defendants must show that the complaint, fairly read, is based solely on petitioning, and to that end the allegations need to be carefully parsed even within a single count. U.S. Const. Amend. 1; Mass. Gen. Laws Ann. ch. 231, § 59H.

2 Cases that cite this headnote

[10] **Extortion** ⇐ Nature and Elements in General

"Extortion" is defined as coercion by improper means that is designed to reap an economic reward.

[11] **Antitrust and Trade Regulation** ⇐ In general; unfairness

Actions alleging extortion, in the business context, can be actionable under statute governing regulation of business practices for consumer protection. Mass. Gen. Laws Ann. ch. 93A, §§ 2, 11.

[12] **Appeal and Error** ⇐ Nature or subject-matter in general

Appeals Court would exercise its discretion to consider defendants' argument that plaintiffs' complaint was barred by litigation privilege that was raised for the first time only in defendants' motion to reconsider trial court's final judgment, where denial of the litigation privilege could be considered under the doctrine of present execution.

[13] **Antitrust and Trade Regulation** ⇐ Privilege or immunity

Civil Rights ⇐ Persons Protected, Persons Liable, and Parties

Libel and Slander ⇐ Judicial Proceedings

Conduct of owners of property neighboring proposed marijuana dispensary was not sufficiently related to their litigation challenging city recreational marijuana zoning bylaw and award of special permit to prospective operators of dispensary to be protected by litigation privilege against prospective operators' claims of violation of statute governing regulation of business practices for consumer protection, violation of Massachusetts Civil Rights Act, and defamation; neighbors were trying to obtain money that they felt was owed by previous owner of dispensary location, and statements at issue were that neighbors would use litigation to obtain monetary relief and thereby cause operators financial ruin, but such monetary relief could not be obtained as a result of neighbors' litigation. Mass. Gen. Laws Ann. ch. 12, § 11I; Mass. Gen. Laws Ann. ch. 93A, §§ 2, 11.

[14] **Libel and Slander** ⇐ Judicial Proceedings

Libel and Slander ⇐ Briefs, arguments, and statements of counsel

Torts ⇐ Litigation privilege; witness immunity

The "litigation privilege" generally precludes civil liability based on statements by a party, counsel, or witness in the institution of, or during the course of, a judicial proceeding, as well as statements preliminary to litigation that relate to the contemplated proceeding.

1 Case that cites this headnote

[15] **Libel and Slander** ⇐ Judicial Proceedings

Torts ⇐ Litigation privilege; witness immunity

The purpose of the doctrine of litigation privilege is to protect parties, counsel, and witnesses so that they may speak freely while asserting their legal rights or participating in judicial proceedings.

[16] **Libel and Slander** ⇐ Judicial Proceedings

Torts ⇐ Litigation privilege; witness immunity

Although the litigation privilege is not confined to statements made during judicial proceedings themselves, where out-of-court statements are at issue, the doctrine requires a fact-specific analysis as to whether such statements sufficiently relate to the proceedings to warrant applying litigation privilege to preclude civil liability based on the statements.

[17] **Libel and Slander** ⇐ Judicial Proceedings

Torts ⇐ Litigation privilege; witness immunity

Litigation privilege does not attach to preclude civil liability based on statements made in connection with litigation where it is not statements themselves that are said to be actionable, such as where statements are being used as evidence of defendants' misconduct.

****412** "Anti-SLAPP" Statute, Constitutional Law, Right to petition government, Privileges and immunities. Privileged Communication. Evidence, Privileged communication. Practice, Civil, Motion to dismiss, Review of interlocutory action, Interlocutory appeal. Consumer Protection Act, Unfair act or practice. Words, "Solely."

CIVIL ACTION commenced in the Superior Court Department on June 5, 2019.

A special motion to dismiss was heard by David A. Deakin, J., and motions to reconsider and to stay proceedings were considered by him.

Attorneys and Law Firms

Alvin S. Nathanson, Boston, (Scott Adam Schlager also present) for the defendants.

Thomas K. MacMillan, Bradford, for the plaintiffs.

Present: Green, C.J., Kinder, & Englander, JJ.

Opinion

ENGLANDER, J.

***627** This case presents issues regarding the types of claims that can survive challenge under the so-called "anti-SLAPP statute," G. L. c. 231, § 59H. The plaintiffs, Caroline Pineau and Haverhill Stem LLC ****413** (collectively Pineau or plaintiffs), sought to operate a marijuana dispensary at a property that Pineau leased in downtown Haverhill. The defendants, Brad Brooks and Lloyd Jennings, own the property next door to Pineau, and opposed the dispensary, including Pineau's efforts to obtain necessary zoning relief. The plaintiff's complaint alleges that Brooks and Jennings coerced and threatened Pineau, in an effort to extort money from her in return for the defendants' agreement to withdraw their opposition to the proposed dispensary.

The complaint accordingly alleges claims, among other things, for violations of G. L. c. 93A and the Massachusetts Civil Rights Act, see G. L. c. 12, § 11I, as well as for defamation. The defendants moved to dismiss under the anti-SLAPP statute, G. L. c. 231, § 59H, arguing that the plaintiff's claims were based upon the defendants' lawful, constitutionally protected petitioning activity. The motion was denied, and the defendants appeal. We affirm.

Background. We recite the well-pleaded facts from the complaint, supplemented in part by facts identified by the judge as a result of the process employed to decide a motion to dismiss under the anti-SLAPP statute.[3]

As is one of the paradigms in anti-SLAPP cases, the plaintiff was seeking something from the government here, and the defendants opposed same. As of 2018 Pineau was seeking to establish a marijuana dispensary in Haverhill's downtown, and was advocating for zoning ordinance changes that would allow such establishments in that district. In October of 2018, Pineau's father purchased the building at 124 Washington Street, the eventual site of her marijuana business. Pineau thereafter contacted her neighbors, including defendant Brooks. The defendants Brooks and Jennings own the property at 128-130 Washington Street, where ***628** they lease out several residential units as well as space for a restaurant, in which Jennings has a financial interest.

According to the complaint, Brooks and Jennings objected to the proposed use of 124 Washington as a marijuana dispensary, unless Pineau first paid them $30,000. The defendants' position was based in a dispute that predated Pineau's lease of the building at 124 Washington. The defendants had been at odds with the prior owner, when the defendants had sought to build a deck behind their own building at 128 Washington. The prior owner raised concerns that the defendants' proposed deck extended onto his property; that dispute was resolved by the defendants paying $30,000 to also build a deck behind 124 Washington. As a result, in the defendants' view "the building," now leased by Pineau, owed the defendants $30,000, and absent a payment the defendants "would fight whatever Pineau proposes for use of the building."

Accordingly, the defendants actively opposed the effort to allow marijuana establishments to operate in the downtown waterfront district. When Pineau first contacted Brooks regarding her plans in October of 2018, Brooks responded: "[W]ell, you better bet me and my partner are going to get our money back from the deck we built, which is $30,000, and make sure you go through the same ****414** hell with the city that we did." The parties met several times thereafter, with Brooks and Jennings reiterating their demand for money. The complaint repeatedly characterizes the way the defendants went about their opposition as "threats" and "coercion." The characterizations by themselves are not sufficient to avoid dismissal, of course; because anti-SLAPP law must account for the defendants' fundamental rights of speech and petitioning, we must go beyond the labels in the complaint, and examine what the defendants allegedly said and did.

Although Haverhill approved the zoning ordinance allowing marijuana establishments in January of 2019, the parties'

dispute continued throughout the first several months of 2019, as did the negotiations. Jennings reportedly told people "around town" that Pineau "doesn't know who she is dealing with" and would "see how Haverhill works."[4] The parties met again in March of 2019, with the defendants demanding $30,000, the use of the deck at ***629** Pineau's building, and "that no cannabis commerce take place on the second or third floor" of Pineau's building. The defendants also threatened to bring a "RICO"[5] lawsuit against Pineau. In subsequent negotiations the defendants raised their price to $50,000, and then to $75,000.

Then, on April 10, 2019, the defendants met with Pineau's husband. During that meeting Jennings became angry. He reiterated the threat of a RICO lawsuit and stated that he was "prepared to try and destroy the Pineaus and their business before it got off the ground." He then went on to say that "the Pineaus don't have the money to fight him and he has already won and was prepared to take everything from the Pineaus, including their house." Further negotiations were unsuccessful. On May 30, 2019, the defendants and another business owner filed a suit in the Land Court against the plaintiff and others, seeking to invalidate the recreational marijuana zoning bylaw on several grounds. On June 5, the day after being served with the complaint in the Land Court action, Pineau filed this lawsuit in the Superior Court. Pineau's complaint states six counts, including claims for violation of G. L. c. 93A, violation of the Massachusetts Civil Rights Act, see G. L. c. 12, § 111, and defamation. The defendants moved to dismiss under the anti-SLAPP statute, contending that the suit was based on their protected right to petition the government. They also moved to dismiss under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), for failure to state a claim. As part of litigating the anti-SLAPP motion, the parties agreed to depositions, and Pineau, Brooks, and Jennings were each deposed.

The Superior Court judge denied the anti-SLAPP motion. Most saliently, he concluded that the defendants had failed to show that Pineau's claims were "based solely on [the defendants'] exercise of the constitutional right to petition" -- the threshold element of anti-SLAPP analysis under the decisions of the Supreme Judicial Court. See 477 Harrison Ave., LLC v. JACE Boston, LLC, 477 Mass. 162, 167-168, 74 N.E.3d 1237 (2017), S.C., 483 Mass. 514, 134 N.E.3d 91 (2019) (477 Harrison); ****415** Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 147-148, 75 N.E.3d 21 (2017), S.C., 483 Mass. 200, 130 N.E.3d 1242 (2019) (Blanchard I). The judge noted that Pineau's claims were based on more than that the defendants had objected to the marijuana dispensary, and more than that the defendants had demanded money to drop their ***630** objection; rather, the plaintiff had "allege[d], not implausibly, that the defendants engaged in a pressure campaign to coerce Pineau to pay them," which had included threats "both [to] Pineau's business project and her family's financial wellbeing." The judge also went on to deny most of the defendants' rule 12 (b) (6) motion.[6, 7]

[1] [2] [3] The defendants appealed from the order denying their anti-SLAPP motion to dismiss, invoking the doctrine of present execution. The defendants also moved for reconsideration, this time pressing an argument that the plaintiff's claims were barred by the litigation privilege. The judge rejected the litigation privilege argument as well, and denied the motion for reconsideration. On the appeal before us, the defendants raise arguments based on the anti-SLAPP statute, the litigation privilege, and their rule 12 (b) (6) motion.[8]

[4] [5] Discussion. 1. The anti-SLAPP motion to dismiss. The anti-SLAPP statute provides a mechanism for early dismissal of civil claims, where those claims are "based solely on [a defendant's] exercise of the right of petition" to the government. 477 Harrison, 477 Mass. at 168, 74 N.E.3d 1237. The Supreme Judicial Court has construed the statute several times, and has provided a framework, which has evolved over time, for analyzing whether an anti-SLAPP motion to dismiss should be allowed. See, e.g., Blanchard v. Steward Carney Hosp., Inc., 483 Mass. 200, 130 N.E.3d 1242 (2019) (***631** Blanchard II); 477 Harrison, 477 Mass. 162, 74 N.E.3d 1237; Blanchard I, 477 Mass. 141, 75 N.E.3d 21; Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 691 N.E.2d 935 (1998). The court has admonished that an anti-SLAPP motion must be evaluated in light of the statute's fundamental purpose, which is to identify and cut off those claims that are "without merit primarily brought to chill legitimate petitioning activities." Blanchard I, supra at 155, 75 N.E.3d 21. To that end, a defendant seeking dismissal must show, at the threshold, that the claims against it "are based solely on [its] exercise of its [constitutional] right to petition" ****416** (emphasis added). Id. at 147, 75 N.E.3d 21. The defendants' motion founders on this threshold requirement.

[6] The standard of review of a denial of an anti-SLAPP motion to dismiss for failure to meet the threshold element is de novo. See Reichenbach v. Haydock, 92 Mass. App. Ct. 567, 572, 90 N.E.3d 791 (2017). In resolving whether the plaintiff's claims here are based solely on the defendants' petitioning activity, we find the Supreme Judicial Court's decision in Blanchard I particularly instructive. In this case, as in Blanchard I, some of the plaintiff's allegations are based on protected petitioning activity, but other significant allegations are not.

[7] In Blanchard I, 477 Mass. at 146, 75 N.E.3d 21, the court addressed a motion to dismiss a single defamation count that alleged defamation by two separate types of statements. The plaintiffs were nurses at a local hospital; the defendants were the hospital and hospital officials. Id. at 142, 75 N.E.3d 21. The hospital defendants had made one set of allegedly defamatory statements publicly, through the Boston Globe Newspaper Co. (Globe); the court ruled that these statements were intended to reach and to influence a public agency that was then investigating the defendants, so the statements qualified as petitioning activity. Id. at 150-151, 75 N.E.3d 21. The court noted that the statements had not been made directly to a government body, but ruled that the statements nevertheless qualified as petitioning activity because they met the statutory definition of § 59H -- in particular, they were "statement[s] made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding" (emphasis added).[9] G. L. c. 231, § 59H. See Blanchard I, supra at 148-151, 75 N.E.3d 21. Accordingly, because the part of the defamation ***632** claim based on the Globe statements was based on the defendants' petitioning activity, it was potentially dismissible under the anti-SLAPP statute and case law.[10] See Id. at 161, 75 N.E.3d 21.

****417** The second type of allegedly defamatory statements in Blanchard I, 477 Mass. at 142, 75 N.E.3d 21, were not made to the Globe, but rather were made internally to hospital staff. As to those statements the court ruled that they did not constitute petitioning activity at all, because those internal statements "ha[d] no plausible nexus to the hospital's efforts to sway [the government's] licensing decision." Id. at 151-152, 75 N.E.3d 21. Accordingly, the portion of the plaintiffs' defamation claim based upon the hospital defendants' internal statements was not dismissible under the anti-SLAPP statute and would go forward, because the defendants could not meet the threshold burden as to that portion. See Id. at 153, 75 N.E.3d 21.

[8] Applying the teachings of Blanchard I here, we conclude that Pineau's claims are not based solely on the defendants' petitioning activity, and thus that the claims survive an anti-SLAPP motion. As discussed, the thrust of Pineau's complaint is that the defendants employed threats in order to coerce Pineau to pay ***633** money, in exchange for which the defendants would drop their opposition to the proposed marijuana dispensary. The threats and coercive actions by the defendants were directed at Pineau rather than a government entity, and thus, as in Blanchard I, 477 Mass. at 148, 75 N.E.3d 21, the question is whether the defendants' conduct could nevertheless qualify as "petitioning," because the actions were "in connection with" an issue under consideration by a government body.

Here, some of the defendants' statements to the Pineaus cannot reasonably be viewed as relating to the defendants' petitioning activities. As discussed, the defendants' focus was to obtain money from Pineau that the defendants knew Pineau did not owe to them. It was in that context -- seeking the $30,000 -- that Jennings made the statements that the Pineaus did not have the money to fight him, that he was preparing to file a RICO claim, and that he "was prepared to take everything from the Pineaus, including their house." Those statements were not reasonably related to the defendants' opposition to Pineau's marijuana dispensary. The defendants' opposition to the dispensary through the Land Court litigation could not have led to the defendants obtaining money from the Pineaus through a lawsuit, let alone to causing the Pineaus financial ruin.[11] Rather, the statements by Jennings, if proved, were part of an extended pattern of threats, made in an effort to coerce payment. We agree with the judge that to the extent the plaintiff's claims were seeking redress for such behavior, they were not based solely on petitioning activity, and not subject to dismissal.

The defendants' arguments to the contrary are not persuasive. It is true that certain allegations in the complaint describe, and are directed at, the defendants' lawful petitioning activity. The defendants have a constitutional right to address the government, and thus to oppose the plaintiff's efforts to change the zoning bylaw and to obtain a special permit. See

Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 387, 131 S.Ct. 2488, 180 L.Ed.2d 408 (2011) (discussing petition clause of First Amendment to United States Constitution). See also 477 Harrison, 477 Mass. at 166, 169-171, 74 N.E.3d 1237. The defendants also have a right to express their opposition passionately; there is nothing **418 actionable in a statement that the defendants would "fight *634 [the plaintiff] every step of the way," provided that in context the fighting is reasonably understood as fighting in the political arena or in court, rather than physical assault. See Van Liew v. Stansfield, 474 Mass. 31, 38-39, 47 N.E.3d 411 (2016), citing New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Moreover, the defendants did not cross a line merely by stating that they would forgo their opposition for a price. See North Am. Expositions Co. Ltd. Partnership v. Corcoran, 452 Mass. 852, 863, 898 N.E.2d 831 (2009) (financial motive behind assertion of petitioning rights irrelevant for anti-SLAPP purposes). It is not inappropriate for parties opposing a neighbor's proposed new land use to state, in essence, that they would be willing to endure the proposed new use, if they were compensated for so enduring. Nor is it inappropriate, thereafter, for the opposers to seek to negotiate that compensation.

[9] [10] [11] The holdings in Blanchard I and Blanchard II demonstrate, however, that defendants do not obtain dismissal through an anti-SLAPP motion just because some of the allegations in the complaint are directed at conduct by the defendants that constitutes petitioning activity. Rather, defendants must show that the complaint, fairly read, is based solely on petitioning, and to that end the allegations need to be carefully parsed even within a single count. See Reichenbach, 92 Mass. App. Ct. at 574-575, 90 N.E.3d 791. Here the defendants did not merely oppose Pineau's proposed business, nor did they merely seek to negotiate their price. Rather, the complaint describes a concerted and extended effort to coerce Pineau to pay, "or else" -- complete with thinly veiled threats such as that Pineau "doesn't know who she is dealing with." The complaint thus adequately describes extortion -- coercion by improper means that is designed to reap an economic reward. Such actions, in the business context, can be actionable under c. 93A, and given the facts alleged here, the suit is not based solely on petitioning activity as required by the anti-SLAPP cases. See G. L. c. 93A, §§ 2, 11; 477 Harrison, 477 Mass. at 172, 74 N.E.3d 1237 ("The allegedly false insurance claims asserted as part of the G. L. c. 93A claim are acts distinct from the related but separate assertedly unfair or deceptive acts concerning the defendants' use of process"); Reichenbach, supra at 575, 90 N.E.3d 791 (Massachusetts Civil Rights Act claim was not based solely on petitioning activity, where many actions giving rise to claim did not constitute petitioning). See also Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc., 420 Mass. 39, 43, 648 N.E.2d 435 (1995).

Finally, the defendants contend that all Pineau has alleged are hardball negotiation tactics, which according to the defendants *635 are accepted business practices that cannot be actionable. Put differently, the defendants argue (1) that they have a right to demand a price for acceding to Pineau's proposed dispensary, and (2) that their liability should not turn on the negotiating tactics they employ.[12] In the first place, we note that these arguments about the appropriateness of negotiating tactics are off point; the question for the anti-SLAPP motion is not whether the negotiating tactics were appropriate, but **419 whether the defendants were engaged in petitioning when they were negotiating.[13] Beyond that, however, we are not persuaded that the defendants had free rein to threaten and coerce, as is alleged, simply because they were contemporaneously involved in legitimate petitioning activity. While we acknowledge that there is room for "rough and tumble" in business negotiations, and that such negotiations could occur in relation to legitimate petitioning activity, the repeated threats alleged here, designed to coerce payment -- including threats that portended economic ruin without basis -- fell outside any acceptable boundary. The anti-SLAPP motion was properly denied.[14]

[12] [13] 2. Litigation privilege. The defendants also argue that the complaint is barred by the litigation privilege, sometimes called the "absolute litigation privilege," because all that the plaintiff complains about are "settlement negotiations or discussions" that occurred in relation to contemplated litigation. Although this issue was raised for the first time only in the defendants' motion to reconsider, a denial of the privilege may be appealed under the doctrine of present execution, Gillette Co. v. Provost, 91 Mass. App. Ct. 133, 140, 74 N.E.3d 275 (2017), and we will exercise our discretion to *636 consider the argument in the interest of efficiency. See Redgate, petitioner, 417 Mass. 799, 801-802,

633 N.E.2d 380 (1994); Mullins v. Pine Manor College, 389 Mass. 47, 63, 449 N.E.2d 331 (1983).

[14] [15] [16] The litigation privilege "generally precludes civil liability based on 'statements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding,' as well as statements 'preliminary to litigation' that relate to the contemplated proceeding" (citation omitted). Gillette Co., 91 Mass. App. Ct. at 140, 74 N.E.3d 275. The purpose of the doctrine is to protect parties, counsel, and witnesses so that they may speak freely while asserting their legal rights or participating in judicial proceedings. See Sriberg v. Raymond, 370 Mass. 105, 108-109, 345 N.E.2d 882 (1976); Visnick v. Caulfield, 73 Mass. App. Ct. 809, 812-813, 901 N.E.2d 1261 (2009). Although the doctrine is not confined to statements made during the proceedings themselves, where out-of-court statements are at issue the doctrine requires a "fact-specific analysis" as to whether such statements sufficiently "relate to" litigation. Correllas v. Viveiros, 410 Mass. 314, 321, 323, 572 N.E.2d 7 (1991), quoting Sriberg, supra at 108, 345 N.E.2d 882. See Patriot Group, LLC v. Edmands, 96 Mass. App. Ct. 478, 484-485, 136 N.E.3d 386 (2019), citing Fisher v. Lint, 69 Mass. App. Ct. 360, 365-366, 868 N.E.2d 161 (2007).

[17] For the reasons discussed above, much of the defendants' conduct alleged here cannot properly be considered as in connection with litigation, and accordingly **420 is not protected by the litigation privilege. The litigation that the defendants contemplated, and eventually brought, were the two Land Court cases that challenged the Haverhill recreational marijuana zoning bylaw and the award of a special permit to Pineau. On the other hand, the alleged statements at issue are that the defendants would use litigation to obtain monetary relief and thereby cause the plaintiff's financial ruin. Such monetary relief, however, could not be obtained as a result of the contemplated Land Court litigation. The alleged coercive and threatening conduct thus is not sufficiently related to a judicial proceeding to be protected by the privilege. [15] Furthermore, "the privilege does not attach ... where it is not the statements themselves that are said to be *637 actionable," such as where the statements are being used as evidence of the defendants' misconduct. Gillette Co., 91 Mass. App. Ct. at 141, 74 N.E.3d 275. See id. at 142, 74 N.E.3d 275 (absent this distinction, "the privilege would eviscerate ... longstanding causes of action"). The Gillette Co. case's distinction between "statements" and "conduct" applies here, in that the alleged statements that the defendants claim are privileged fairly can be viewed as part of the conduct of extortion. [16], [17]

Order denying special motion to dismiss affirmed.

All Citations

99 Mass.App.Ct. 626, 172 N.E.3d 410

Footnotes

1 Caroline Pineau.

2 Brad Brooks.

3 Unlike with a motion pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), § 59H expressly provides that in ruling on a special motion to dismiss, the court "shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." In this case the parties not only submitted affidavits, but also agreed to the taking of a limited number of depositions.

4 According to the complaint, Brooks and Jennings also made their demand known to "many people in the Haverhill business and downtown community," which resulted in "people" "ask[ing] Pineau why she owed

[Brooks and Jennings] $30,000." These alleged statements by the defendants were the basis for Pineau's defamation claim.

5 Presumably, a lawsuit under the Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (c) (1988).

6 Since filing the complaint, Pineau has received all of the necessary permits and approvals, and the dispensary has been open since June of 2020. As a result, in response to the rule 12 (b) (6) motion the plaintiff agreed to dismiss one of the six counts -- for intentional interference with contractual and economic relations. The judge also dismissed the count for civil harassment. The remaining counts were allowed to proceed -- the three counts mentioned above, as well as a count for civil conspiracy.

7 Following the issuance of a special permit to Haverhill Stem LLC, the defendants filed a second Land Court suit, in September of 2019, challenging the issuance of the special permit. The first suit, challenging the zoning ordinance, resulted in a judgment adverse to the defendants, and is now on appeal to this court. The second suit, challenging the issuance of the special permit, was voluntarily dismissed in June of 2020.

8 The denial of the defendants' anti-SLAPP motion to dismiss is immediately appealable under the doctrine of present execution. See Gillette Co. v. Provost, 91 Mass. App. Ct. 133, 136-137, 74 N.E.3d 275 (2017). The same is true of a "denial of a motion to dismiss predicated on litigation privilege." Id. at 140, 74 N.E.3d 275. On the other hand, the denial of a rule 12 (b) (6) motion generally is not appealable on an interlocutory basis, and we do not address those issues. See Chiulli v. Liberty Mut. Ins., Inc., 87 Mass. App. Ct. 229, 232-233, 28 N.E.3d 482 (2015). See also Elles v. Zoning Bd. of Appeals of Quincy, 450 Mass. 671, 674-675, 881 N.E.2d 129 (2008).

9 The anti-SLAPP statute defines petitioning activity as follows:

> "[1] any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; [2] any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; [3] any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; [4] any statement reasonably likely to enlist public participation in an effort to effect such consideration; or [5] any other statement falling within constitutional protection of the right to petition government."

G. L. c. 231, § 59H.

10 Under the Supreme Judicial Court's precedent, once a defendant invoking the anti-SLAPP statute meets the threshold showing that the claims against it are based on its petitioning activity, the burden then shifts to the plaintiff, who can avoid dismissal by making one of two showings:

> "First path.... '(1) the [defendant's] exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the [defendant's] acts caused actual injury to the [plaintiff].'

...

"Second path. [Alternatively,] ... (a) [the plaintiff's] suit was 'colorable'; and (b) ... the suit was not ' "brought primarily to chill" the [defendant's] ... legitimate exercise of its right to petition.' "

Blanchard II, 483 Mass. at 204, 130 N.E.3d 1242, quoting G. L. c. 231, § 59H, and Blanchard I, 477 Mass. at 159-161, 75 N.E.3d 21. Because the defendants' anti-SLAPP motion here fails at the threshold, we do not need to reach the second stage of the framework and thus do not address it.

11 The references to a possible RICO claim have not been fleshed out in the pleadings, and no such suit was ever brought. Those vague references do not suffice as petitioning activity that would insulate the defendants' behavior from suit. See 477 Harrison, 477 Mass. at 171 n.9, 74 N.E.3d 1237.

12 We note that during depositions the defendants denied many of the plaintiff's allegations regarding the defendants' conduct during these negotiations. The factual dispute cannot be resolved on this special motion to dismiss.

13 The defendants' argument sounds more like an argument that their conduct could not violate c. 93A, the Massachusetts Civil Rights Act, or the common-law causes of action. Put differently, it is an argument that the plaintiff's claims could not survive a rule 12 (b) (6) motion. However, as discussed above, see note 8, supra, the rule 12 (b) (6) motion is not before us. We are satisfied that the c. 93A claim, at least, is sufficiently viable to survive an anti-SLAPP motion, and we express no opinion on the viability of Pineau's remaining claims under rule 12 (b) (6).

14 The defendants do not make a separate argument that their conduct constituted protected speech -- that is, that their statements did not constitute "true threats"; we accordingly do not consider the issue. See United States v. Coss, 677 F.3d 278, 289 (6th Cir. 2012) (holding that extortionate threats are "true threats").

15 Nor could the statements be considered privileged on a theory that they were made in anticipation of a purported RICO suit. From its earliest formulations, the Supreme Judicial Court has noted that the litigation privilege applies only to statements made in anticipation of proceedings where those proceedings are "contemplated in good faith and ... under serious consideration." Sriberg, 370 Mass. at 109, 345 N.E.2d 882. Here, no such suit was ever brought, nor have we been provided with reason to believe that it was seriously contemplated.

16 The plaintiff's request for appellate attorney's fees pursuant to Mass. R. A. P. 25, as appearing in 481 Mass. 1654 (2019), and G. L. c. 231, § 6F, is denied. The defendants' request for appellate attorney's fees pursuant to McLarnon v. Jokisch, 431 Mass. 343, 727 N.E.2d 813 (2000), is denied.

17 To the extent that we do not address the defendants' other contentions, "they 'have not been overlooked. We find nothing in them that requires discussion.' " Department of Revenue v. Ryan R., 62 Mass. App. Ct. 380, 389, 816 N.E.2d 1020 (2004), quoting Commonwealth v. Domanski, 332 Mass. 66, 78, 123 N.E.2d 368 (1954).

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